Rosenizam bin Maharam v Public Prosecutor

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO 42-4 OF 2000
LOW HOP BING J
27 NOVEMBER 2002

Criminal Law *— Dangerous Drugs Act (Malaysia) — s 6 — Control — Accused was wearing jacket from which cannabis had been recovered — Whether accused had control of cannabis — Whether trial judge correctly raised presumption that accused deemed to have been in possession of cannabis and deemed to have known nature of drugs*

Criminal Procedure *— Appeal — Conviction, against — Whether there was sufficient evidence for trial judge to arrive at his finding of facts — Whether accused had rebutted presumption that he was deemed to be in possession of drugs on balance of probabilities — Whether trial judge had occasioned miscarriage of justice in concluding that prosecution had proved its case beyond reasonable doubt — Whether conviction should be upheld*

Criminal Procedure *— Charge — Framing or particulars of — Inclusion of word 'menguasai' in charge — Word 'menguasai' not used in Dangerous Drugs Act 1952 — Whether charge was invalid — Whether word 'menguasai' used in charge was synonymous with 'control' in context of s 6 of Dangerous Drugs Act 1952 — Whether accused had been misled or prejudiced*

Words and Phrases *— Control — Meaning of — Dangerous Drugs Act 1952 s 6*

On 24 September 1999, Chief Inspector Mohamad Hanifa ('SP8'), stopped the accused at a roadblock. The accused alighted from the motorcycle and SP8 conducted a body search on the accused and recovered a black plastic parcel from the lower left pocket of the green jacket worn by the accused. Upon opening the parcel, SP8 found a granular substance suspected to be cannabis. The accused was charged with an offence under s 6 of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39A(2) of the Act. The trial judge found that the prosecution had established a prima facie case against the accused and he was ordered to enter his defence. In his evidence given on oath, the accused testified that he had borrowed the jacket from one Zaharuddin bin Jamaluddin ('SD2') to keep himself warm on his journey from Kuala Lumpur to Melaka. The accused stated that he did not examine the jacket although he felt it was thick and heavy. The trial judge convicted the accused and sentenced him to 11 years' imprisonment with effect from the date of arrest and ten strokes of the rotan. This was the accused's appeal against the conviction and the sentence. In this appeal, the defence counsel submitted that the charge was bad and defective since the word 'menguasai' in the charge did not disclose an offence in law as the word 'menguasai' had never been used in the Act. It was further submitted for the accused that the trial judge had failed to consider the confusion arising from the jacket as it was a borrowed jacket. Furthermore, the accused submitted that the prosecution had failed to prove that the accused was found to be 'in possession to the exclusivity of others' of the drugs. The accused

also challenged, among other things: (i) the findings of the chemist; and (ii) the failure to dust for fingerprints. A

Held, dismissing the appeal:

(1) The issue relating to the validity of the charge based on the word 'menguasai' had never been raised by the defence before the trial judge. In any case, since the ground of appeal had indeed clearly indicated and conceded that the defence had always understood the word 'menguasai' in the charge as synonymous with the word 'control' in English, the submission by the learned counsel in the present appellate proceedings that the word 'menguasai' did not mean 'control' in English did not make sense. The word 'menguasai' as used in the context of the charge was synonymous with 'control' in the context of s 6 of the Act. In the circumstances, the charge had been precisely formulated to include the specific accusation against the accused, who had neither been misled nor prejudiced (see pp 56H–I, 57E–H, 58D). B C D

(2) The chemist had applied four established tests, namely physical examination, microscopic test, Dusquenois-Levine test and thin layer chromatography test to determine that the contents were cannabis. The chemist had testified that the contents were dry and as such, the trial judge did not uphold the defence's contention that the chemist had failed to ensure that the contents to be tested were devoid of air and moisture before the same were weighed. Accordingly, the chemist's evidence had been correctly accepted by the trial judge and the accused's ground of appeal challenging the finding by the chemist on the weight was without merit and cannot be sustained (see p 60A–D). *Public Prosecutor v Lee Beng Siang* [1992] 2 MLJ 120 distinguished E F

(3) In respect of the defence's submission that fingerprint dusting was not carried out on the packets containing the cannabis, there was absolutely no doubt as to the identity of the accused who was wearing the jacket from which the cannabis had been recovered. As such, fingerprint evidence would therefore assume little value or significance (see p 63D–F). *Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1997] 1 CLJ 223 followed; *Public Prosecutor v Fom It Cheong* [1991] 1 CLJ 160 distinguished. G

(4) The issue of the borrowed jacket was never put to any of the prosecution witnesses. Had the jacket been borrowed by the accused, this issue would certainly be put to any of the prosecution witnesses so that a foundation could be laid for the defence to make a submission thereon. Accordingly, there was merit in the prosecution's submission that the issue of the borrowed jacket was a recent invention or an afterthought (see pp 63I–64C). H I

(5) The word 'control' must be construed to mean any form of control other than actual physical control. Actual physical condition would

A be 'custody' for which other names were 'physical possession', 'de facto possession' and 'detention'. In the circumstances, the trial judge was correct in finding that the accused, who was wearing the jacket from which the cannabis had been recovered, had in his control the cannabis, in which case s 37(d) of the Act had been correctly invoked by the trial judge to raise the presumption that B the accused was deemed to have been in possession of the cannabis and shall, until the contrary is proved, be deemed to have known the nature of such drug (see pp 65G, 60B–C). *Neo Koon Cheo v Reg* [1959] 25 MLJ 47 followed; *Public Prosecutor v Sim Ah Ba & Anor* [1997] 4 MLJ 47 followed.

C (6) The accused's evidence that he did not examine the jacket and that he did not know the contents in the jacket was not accepted by the trial judge. There was sufficient evidence for the trial judge to arrive at this finding of fact and the accused had not rebutted the presumption on a balance of probabilities. An appellate court should be slow to disturb the lower court's finding of fact unless D it can be shown that the finding was not supported by the evidence or against the weight of evidence or that it was a perverse finding (see p 66D–H).

(7) The trial judge had not occasioned any miscarriage of justice in his conclusion and finding that the prosecution had proved its case E against the accused beyond reasonable doubt and that the accused was guilty of the offence as charged, thereby convicting the accused. Accordingly, his conviction was upheld (see p 67A–B).

(8) Since the weight of cannabis recovered from the accused was more than 50g in weight, the accused was liable to be punished F with imprisonment for life or for a term which shall not be less than five years, and whipping of not less than ten strokes. The trial judge took into account public interest as the accused was a fireman and rescue worker who should not misuse his position to commit the instant offence. The sentence meted out by the trial judge was therefore, clearly within the ambit of s 39A(2) of the G Act and was fair and reasonable having regard to the facts and circumstances of this appeal. The power of sentencing was essentially an exercise of discretion which was capable of correction by the appellate court only if it was not exercised according to established judicial principles or was against public interest or other sentencing policy established by judicial H pronouncements or the legislature. In the instant case, the trial judge had imposed the sentence in exercise of his discretion judicially, correctly, fairly and reasonably (see p 67B–G).

I **[Bahasa Malaysia summary**

Pada 24 September 1999, Ketua Inspektor Mohamad Hanifa ('SP8'), telah menahan tertuduh di satu sekatan jalan. Tertuduh telah turun

dari motosikal dan SP8 telah menjalankan satu pemeriksaan ke atas badan tertuduh dan menjumpai satu bungkusan plastik berwarna hitam dalam poket di bahagian bawah kiri jaket hijau yang dipakai oleh tertuduh. Apabila membuka bungkusan tersebut, SP8 menjumpai satu bahan disyaki kanabis. Tertuduh telah dituduh dengan satu kesalahan di bawah s 6 Akta Dadah Berbahaya 1952 ('Akta tersebut') yang boleh dihukum di bawah s 39A(2) Akta tersebut. Hakim perbicaraan mendapati bahawa pihak pendakwa raya telah membuktikan satu kes prima facie terhadap tertuduh dan beliau diperintahkan untuk memasuki pembelaan beliau. Dalam keterangan bersumpah beliau, tertuduh memberi keterangan bahawa beliau telah meminjam jaket tersebut daripada seorang Zaharuddin bin Jamaluddin ('SD2') untuk memanaskan badan beliau semasa dalam perjalanan daripada Kuala Lumpur ke Melaka. Tertuduh telah menyatakan bahawa beliau tidak memeriksa jaket tersebut walaupun beliau merasai ia tebal dan berat. Hakim perbicaraan telah menyabitkan tertuduh dan menjatuhkan hukuman 11 tahun penjara bermula daripada tarikh tangkapan dan 10 sebatan rotan. Ini adalah rayuan tertuduh terhadap sabitan dan hukuman tersebut. Dalam rayuan ini, peguam pembelaan berhujah bahawa pertuduhan tersebut adalah salah dan defektif kerana perkataan 'menguasai' dalam pertuduhan tidak pernah digunakan dalam Akta tersebut. Seterusnya, telah dihujahkan bagi pihak tertuduh bahawa hakim perbicaraan telah gagal untuk menimbangkan kekeliruan yang timbul berkenaan dengan jaket tersebut kerana ia adalah jaket yang dipinjam. Tambahan lagi, tertuduh mengatakan bahawa pihak pendakwaan telah gagal untuk membuktikan bahawa tertuduh telah dijumpai bersama dengan dadah tersebut 'in possession to the exclusivity of others'. Tertuduh juga telah mencabar, antara lainnya: (i) penemuan yang dibuat oleh ahli kimia; dan (ii) kegagalan untuk mengambil cap jari.

Diputuskan, menolak rayuan tersebut:

(1) Persoalan berkaitan kesahan pertuduhan tersebut berdasarkan perkataan 'menguasai' tidak pernah ditimbulkan oleh pihak pembelaan di hadapan hakim perbicaraan. Dalam apa keadaan pun, memandangkan alasan rayuan dengan jelas menandakan dan mengaku bahawa pihak pembelaan sentiasa bersetuju dengan perkataan 'menguasai' dalam pertuduhan tersebut sebagai sinonim dengan perkataan 'control' dalam Bahasa Inggeris, hujah oleh peguam yang bijaksana dalam prosiding rayuan semasa bahawa perkataan 'menguasai' tidak bermakna 'control' dalam Bahasa Inggeris tidak diterima akal. Perkataan 'menguasai' sebagaimana yang digunakan dalam konteks pertuduhan tersebut adalah sinonim dengan 'control' dalam konteks s 6 Akta tersebut. Dalam keadaan sedemikian, pertuduhan tersebut telah dibentuk dengan tepat untuk memasukkan tuduhan khusus terhadap tertuduh, yang tidak diperdaya atau diprejudiskan oleh pertuduhan tersebut (lihat ms 56H–I, 57E–H, 58D).

(2) Ahli kimia telah memakai empat ujian yang tetap, iaitu pemeriksaan fizikal, ujian mikroskop, ujian Dusquenois-Levine dan ujian lapisan nipis kromatograf untuk memastikan bahawa kandungan tersebut adalah kanabis. Ahli kimia tersebut telah memberikan keterangan bahawa kandungan tersebut adalah kering dan oleh demikian, hakim perbicaraan tidak mengekalkan hujah pihak pembelaan bahawa ahli kimia tersebut telah gagal untuk memastikan bahawa kandungan yang akan diuji tersebut tidak mempunyai udara atau lembapan sebelum ia ditimbang. Sewajarnya, keterangan ahli kimia telah diterima dengan betul oleh hakim perbicaraan dan alasan rayuan tertuduh yang mencabar penemuan oleh ahli kima tersebut tentang beban adalah tanpa merit dan tidak boleh kekal (lihat ms 60A–D). *Public Prosecutor v Lee Beng Siang* [1992] 2 MLJ 120 dibeza.

(3) Berhubung hujah pihak pembelaan bahawa pendebuan cap jari tidak dilakukan ke atas bungkusan-bungkusan yang mengandungi kanabis, adalah didapati memang tiada keraguan tentang identiti tertuduh yang memakai jaket di mana kanabis tersebut dijumpai. Oleh demikian, keterangan berkenaan dengan cap jari dianggap mempunyai nilai atau makna yang sedikit (lihat ms 63D–F); *Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1997] 1 CLJ 223 diikut dan *Public Prosecutor v Fom It Cheong* [1991] 1 CLJ 160 dibeza.

(4) Persoalan tentang jaket yang pinjam tersebut tidak pernah diutarakan kepada mana-mana saksi pendakwa. Sekiranya jaket tersebut telah dipinjam oleh tertuduh, persoalan ini pasti telah dikemukakan kepada mana-mana saksi pendakwa agar satu asas boleh dibentuk untuk pihak pembelaan membuat satu penghujahan. Sewajarnya, terdapat merit dalam hujah pihak pendakwaan bahawa persoalan jaket yang dipinjam tersebut adalah satu rekaan baru atau sesuatu yang difikirkan kemudian (lihat ms 63I–64C).

(5) Perkataan 'control' harus ditafsirkan sebagai membawa maksud apa-apa kawalan selain daripada kawalan fizikal sebenar. Kawalan fizikal sebenar boleh jadi 'custody' di mana nama-nama lain baginya adalah 'physical possession', 'de facto possession' dan 'detention'. Dalam keadaan sedemikian, hakim perbicaraan adalah betul apabila mendapati bahawa tertuduh, yang memakai jaket di mana kanabis tersebut dijumpai, telah mempunyai dalam kawalan beliau kanabis tersebut, di mana s 37(d) Akta tersebut telahpun digunakan dengan betul oleh hakim perbicaraan tersebut untuk menimbulkan satu andaian bahawa tertuduh dianggap memiliki kanabis tersebut dan hendaklah, sehingga yang sebaliknya dibuktikan, dianggap sebagai mengetahui sifat dadah tersebut (lihat ms 65G, 60B–C); *Neo Koon Cheo v Reg* [1959] 25 MLJ 47 dan *Public Prosecutor v Sim Ah Ba & Anor* [1997] 4 MLJ 47 diikut.

(6) Keterangan tertuduh bahawa beliau tidak memeriksa jaket tersebut dan bahawa beliau tidak mengetahui kandungan dalam jaket tersebut tidak diterima oleh hakim perbicaraan. Terdapat keterangan yang mencukupi untuk hakim perbicaraan tiba kepada penemuan fakta ini dan tertuduh tidak mematahkan andaian tersebut atas imbangan kebarangkalian. Sesuatu mahkamah rayuan sepatutnya tidak campur tangan dalam penemuan fakta mahkamah rendah kecuali jika telah dibuktikan bahawa penemuan tersebut tidak disokong oleh keterangan atau bertentangan dengan kesahihan keterangan atau ia adalah satu penemuan yang berlawanan (lihat ms 66D–H).

(7) Hakim perbicaraan tidak melakukan apa-apa pelaksanaan salah undang-undang dalam keputusan dan penemuan beliau bahawa pihak pendakwa telah membuktikan kesnya terhadap tertuduh melampaui keraguan munasabah dan bahawa tertuduh adalah bersalah kerana kesalahan sepertimana yang dituduh, justeru itu menyabitkan tertuduh. Sewajarnya, sabitan beliau dikekalkan (lihat ms 67A–B).

(8) Memandangkan berat kanabis yang dijumpai atas tertuduh adalah melebihi berat 50g, tertuduh boleh dihukum penjara seumur hidup atau bagi tempoh tidak kurang daripada lima tahun, dan sebatan tidak kurang daripada 10 kali. Hakim perbicaraan mengambil kira kepentingan awam kerana tertuduh adalah seorang ahli bomba dan pekerja penyelamat yang tidak sepatutnya menyalahgunakan kedudukan beliau untuk melakukan kesalahan sedemikian. Hukuman yang dilaksanakan oleh hakim perbicaraan adalah oleh itu, jelas dalam ruang lingkup s 39A(2) Akta tersebut dan adalah adil dan munasabah dengan mengambil kira fakta-fakta dan keadaan-keadaan rayuan ini. Kuasa penghukuman pada dasarnya adalah pelaksaan budi bicara yang boleh dibetulkan oleh mahkamah rayuan hanya sekiranya ia tidak dilaksanakan menurut prinsip-prinsip kehakiman yang tetap atau yang bertentangan dengan kepentingan awam atau polisi penghukuman lain yang ditetapkan oleh pengisytiharan kehakiman atau badan perundangan. Dalam kes semasa, hakim perbicaraan telah menjatuhkan hukuman dalam melaksanakan budi bicara beliau secara tidak berat sebelah, betul, adil dan munasabah (lihat ms 67B–G).]

Notes

For cases on s 6 of the Dangerous Drugs Act (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2000 Reissue), para 59.

For cases on appeal against conviction, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 232–248.

For cases on framing or particulars of charge, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 956–1052.

Cases referred to

Dato' Seri Anwar bin Ibrahim v Public Prosecutor [2002] 3 MLJ 193 (refd)
Ho Seng Seng v Rex [1951] MLJ 225 (refd)
Neo Koon Cheo v Reg [1959] MLJ 47 (folld)
New Tuck Shen v Public Prosecutor [1982] 1 MLJ 27 (refd)
PP v Fam Kim Hock [1957] MLJ 20 (refd)
PP v Fom It Cheong [1991] 1 CLJ 160 (distd)
PP v Lee Beng Siang [1992] 2 MLJ 120 (distd)
PP v Lin Lian Chen [1992] 2 MLJ 561 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560 (folld)
PP v Mohamed Noor bin Jantan [1979] 2 MLJ 289 (refd)
PP v Sim Ah Ba & Anor [1997] 4 MLJ 47 (folld)
PP v Wahab bin Abdullah [1991] 1 MLJ 218 (refd)
PR v Tan Chee Kern & Anor [2001] MLJU 557, [2002] 1 CLJ 210 (refd)
R v Ball [1951] 35 Cr App R 164 (refd)
Toh Ah Loh and Mak Thim v Rex [1949] MLJ 54 (refd)

Legislation referred to

Criminal Procedure Code ss 156, 422
Dangerous Drugs Act 1952 ss 2, 6, 37(d), 39A(2), (f), 39B
Dangerous Drugs Ordinance ss 6, 9, 10(2)
National Language Acts 1963/67 s 7(1)

Appeal from: Arrest Case No: 61–1 of 1999 (Sessions Court, Melaka)

Markhan Singh (*Mohd Latip & Associates*) for the appellant.
Abdul Rashid bin Hj Daud (Deputy Public Prosecutor) for the respondent.

Low Hop Bing J:

Appeal

This is an appeal by the appellant-accused ('accused') who had on 12 April 2000 been convicted and sentenced to 11 years' imprisonment with effect from the date of arrest ie 24 September 1999 and 10 strokes of the rotan by the learned sessions court judge ('the trial judge') on the following charge:

> Bahawa kamu pada 24 September 1999 jam lebih kurang 1940hrs di Plaza Tol Ayer Keroh, di dalam daerah Alor Gajah, di dalam negeri Melaka, sebagai seorang yang tidak diberi kuasa di bawah s 4 dan 5 atau sebarang peraturan yang dinyatakan di bawah s 7 Akta Dadah Berbahaya 1952 (Akta 234) didapati menguasai dadah ganja berat bersihnya 176.7g, yang mana disenaraikan di Bahagian 1 Jadual Pertama Akta Dadah Berbahaya 1952 (Akta 234). Oleh yang demikian kamu telah melakukan kesalahan di bawah s 6 Akta Dadah Berbahaya 1952 (Akta 234) dan boleh dihukum di bawah s 39A(2) Akta yang sama.

[My translation:

That you on 24 September 1999 at about 1940hrs at the Ayer Keroh Toll Plaza, in the district of Alor Gajah, in the state of Melaka, being a person who is not authorized under ss 4 and 5 or any regulation made under s 7 of the Dangerous Drugs Act 1952 (Act 234) 'didapati menguasai' a net weight of 176.7g of cannabis, listed under Part 1 of the First Schedule to the Dangerous Drugs Act 1952 (Act 234). You have thereby committed an offence under s 6 of the Dangerous Drugs Act 1952 (Act 234) and punishable under s 39A(2) of the same Act.]

(hereinafter referred to as 'the charge').

I have for the moment deliberately refrained from translating the words 'didapati menguasai' in the charge as it is a matter of controversy raised by the defence.

Validity of charge

Learned defence counsel En Markhan Singh launched the appeal by stating that the charge contained the words 'didapati menguasai' in respect of the offence alleged against the accused under s 6 of the Dangerous Drugs Act 1952 ('the Act'), while s 6 describes the offence as 'menyimpan atau berada dalam pemilikannya, penjagaannya atau pengawasan' ('keeps, or has in his possession, custody or control'). He argued that the word 'menguasai' has never been used in the Act. He added that for the word 'custody', it is 'penjagaan' in Bahasa Malaysia, while for the word 'control', it is 'pengawasan'.

He said that the charge is bad and defective from day one since the word 'menguasai' in the charge on which the prosecution rests does not disclose an offence in law. He stressed that to construe the word 'menguasai' as 'control' was a misdirection. However, he did not state what the word 'menguasai', in the context of the charge, means in English. He submitted that the accused should have been charged with 'being in possession'.

On the other hand, learned deputy public prosecutor En Abdul Rashid bin Hj Daud, in response, contended that s 6 does not merely provide for the words 'in possession' only and that the charge is not defective simply because the word 'menguasai' was used. He added that in standard Bahasa Malaysia, the word 'control' means 'kawalan' or 'kuasa'.

He submitted that the authoritative text of the Act is the English text and not the Bahasa Malaysia text and that the word 'menguasai' in the charge is synonymous with the word 'control' in the English text contained in s 6.

In any event, it was stressed for the prosecution that the charge is not rendered defective by the word 'menguasai' therein as the accused was neither misled or prejudiced and asked the court to invoke s 156 of the Criminal Procedure Code as it was a mere irregularity and not an illegality and so can be cured under s 422 of the same Code.

On my part, it is necessary for me to emphasize immediately that the issue relating to the validity of the charge based on the word 'menguasai' has never been raised by the defence before the trial judge, either as a preliminary issue, at the close of the prosecution's case, or in the defence case.

A After a careful and proper perusal of the accused's petition of appeal filed by his learned counsel, it is my specific finding that the learned counsel's submission as adumbrated above has substantially deviated or departed from the first ground of appeal which was drafted in para 4.1 thereof in the following words:

B > Yang bijaksana hakim mahkamah sesyen telah tersilap dari segi undang-undang dan fakta apabila menimbangkan pertuduhan hanya atas dasar 'MENGUASAI' (control) dadah tersebut sedangkan fakta kes pendakwaan tidak berkisar ke atas dasar MENGUASAI tetapi di atas faktor PEMILIKAN. Oleh itu pertuduhan adalah cacat dan salah di sisi undang-undang dan penimbangan sepenuhnya ke atas unsur-unsur atau nas-nas pemilikan yang
C > perlu tidak dilakukan oleh tuan hakim dan sekiranya beliau melakukan penimbangan tersebut beliau akan mendapati bahawa pendakwaan telah gagal membuktikan 'pemilikan' dalam kes ini dan ini telah mengakibatkan ketidakadilan ke atas Perayu.
>
> [My translation:
>
> The learned sessions court judge has erred in law and in fact in
D > considering the charge on the basis of 'MENGUASAI' (control) of the said drug, when the facts of the prosecution's case were not based on MENGUASAI but on the factor of POSSESSION. Hence the charge is defective and wrong in law, and the judge has not embarked upon a full consideration of the ingredients or authorities on possession as required, and if the judge had done so, he would have found that the prosecution has failed to establish 'possession' in this case, and this has resulted in an injustice to the
E > appellant.]

Since this ground of appeal has indeed clearly indicated and conceded that the defence has always understood the word 'menguasai' in the charge as synonymous with the word 'control' in English, the aforesaid submission by the learned counsel in the present appellate proceedings that the word
F 'menguasai' does not mean 'control' in English is beyond my powers of comprehension.

In my view, his submission is a complete contradiction vis-a-vis the import contained in para 4.1 of the petition of appeal. He is undergoing an exercise in futility involving a non-issue as the word 'menguasai' has at all material time been used and construed by him as being synonymous with
G the word 'control' in the English language.

In addition, in some leading dictionaries, the word 'control' is listed as meaning, inter alia, 'kuasa' (see *Istilah Undang-Undang Sweet & Maxwell*, (1998) p 46). Further the *Dewan Bahasa dan Pustaka English-Malay Dictionary 1991* and *Dewan Bahasa dan Pustaka Kamus Dwibahasa*, (Edisi
H Kedua, 2001) also list the meaning of 'control' as including 'menguasai'.

In my judgment, the word 'menguasai' as used in the context of the charge can be and is hereby construed as including and indeed is synonymous with the word 'control' in the context of s 6 of the Act which, where relevant, reads as follows:

I > Any person who keeps or has in his ... control ... any ... cannabis ... except under and in accordance with an authorization such as is referred to in ss 4 and 5 or with any regulation made under s 7 thereof, shall be guilty of an offence against this Act ... .

This Act was drafted before Merdeka or Independence Day on 31 August 1957 in the English language and so the text in English is the authoritative text: s 7(1) National Language Acts 1963/67. For that matter any written law enacted before 1 September 1967 shall be construed by reference to the English text as the authoritative text unless the Yang diPertuan Agong prescribes the national language translation thereof as the authoritative text: s 7(1), ibid. There was no submission that the national language translation had been prescribed as the authoritative text.

In *Public Prosecutor v Wahab bin Abdullah* [1991] 1 MLJ 218, LC Vohrah J (now Judge Ad Litem of the War Crime Tribunal) held, inter alia, that since the passing of the National Language Act 1967, there was nothing in the law which prohibited an accused person being charged on 4 September 1984 with an offence under s 39B of the Act in Bahasa Malaysia, as the purpose of the charge is to intimate to the accused the nature of the offence against him and can be expressed in any language that is understood by the accused. If I may add, this includes the situation in which the translation or interpretation of the charge to an accused may be effected in his mother tongue, which may well be a language other than Bahasa Malaysia or English.

In the circumstances, I have absolutely no difficulty in holding that the charge has been precisely formulated to include the specific accusation against the accused who has neither been misled nor prejudiced as para 4.1 of his own petition of appeal has proceeded on the premise that he has been charged by using the word 'menguasai' ie 'control' which is consistent with s 6 and is hereby upheld as being valid.

Merits of appeal

Submission by defence

It was raised for the accused that the trial judge has failed to consider the confusion arising from the jacket, exh P12 ('the jacket'), and no clear identification as to where the jacket was found as it was borrowed from DW2 in order to go to Melaka from Kuala Lumpur and that the accused did not have knowledge of the existence of the drug, since mere knowledge is insufficient. This question of borrowed jacket was raised merely in the defence case.

Learned counsel for the accused stressed that the prosecution has failed to prove that the accused was found to be 'in possession to the exclusivity of others', as the accused was merely wearing the jacket when he was stopped by the police.

It was canvassed for the accused that there was no attempt to dust for fingerprints as it was vital to do so and as such there was insufficient identification.

The next ground of appeal was that the trial judge has not given due consideration to the defence case as the jacket and other clothes were left hanging in the premises where bachelors reside and the key to the premises was left outside the room to allow easy access. There was nothing strange

to borrow the jacket. The fact that the accused did not attempt to flee from the scene should be construed as not knowing of the incriminating item.

It was argued that the defence has succeeded in rebutting the presumption under s 37(d) of the Act and that the trial judge has misdirected himself on the above issues, in addition to the failure on the part of the prosecution to prove its case beyond reasonable doubt.

Submission by prosecution

For the prosecution, it was submitted that the evidence is clear in that the accused did not dispute that he was wearing the jacket wherein the drug was found.

The learned deputy added that since the drug was found in the accused's physical possession, the presumption under s 37(d) applies.

The prosecution emphasized that there was no doubt in the identity of the drug which Chief Inspector Mohamad Hanifa bin Madarshah ('SP8') has identified. There was also no break in the chain of evidence, although the prosecution did not produce a red plastic bag as the defence has never cross-examined SP8 and police inspector Suzaini bin Mohamad ('SP10').

It was argued that the chemist has applied the right method and that the trial judge has very carefully weighed the evidence before finding that there was a prima facie case for the accused to answer.

The learned deputy added that the accused's story of the jacket being found on the motorcycle was a recent invention in the defence case as this question was never put to Detective Lance Corporal Abdul Hadi bin Ismail ('SP6'), SP8 and Lance Corporal Mohd Sham bin Ahmad ('SP9').

Finally, it was stated for the prosecution that the trial judge has the opportunity of observing the witnesses and to assess their demeanour in arriving at a finding of facts and so the appellate court should be slow in disturbing the finding of facts.

Decision on appeal

For the purposes of this appeal, I shall evaluate the entire evidence in order to determine the correctness or otherwise of the decision of the trial judge.

CHEMIST'S EVIDENCE

On 1 October 1999 at about 11.55am, SP1, En Ismail bin Talib, a chemist attached to the Chemistry Department Petaling Jaya received an envelope marked 'S' with its contents marked PDRM 238 ('the exhibits') pertaining to Durian Tunggal Report 647-8/99 from SP10, Inspector Suzaini bin Mohamed, and gave a receipt thereof Makmal (PJ) FOR 6359/99-0. The chemist kept and locked the envelope and its contents in his steel cabinet. He held the keys.

On 9 November 1999, he carried out an analysis of the contents and found them to consist of cannabis as defined in s 2 of the Act, weighing 19.5g in four plastic packets; 100.1g and 57.1g respectively in one plastic parcel each. The total net weight of the cannabis is 176.7g as stated in the charge.

The chemist's evidence has been correctly accepted by the trial judge, as the chemist has applied four established tests viz physical examination, microscopic test, Dusquenois-Levine test and thin layer chromatography test to determine that the contents were cannabis.

It was argued for the defence that the chemist has failed to ensure that the contents to be tested were devoid of air and moisture before weighing the contents and that he did not take into consideration the weight of the air and moisture in his reckoning of the net weight of the contents, relying on the High Court decision in *Public Prosecutor v Lee Beng Siang* [1992] 2 MLJ 120, where the chemist confessed that the contents of each of the packets tested contained a certain amount of air and moisture, both of which carried weight albeit, negligible. The facts there were clearly distinguishable from the facts in the instant appeal.

The trial judge did not uphold the defence contention as the chemist in this appeal has testified that the contents tested were dry and there was no suggestion by the defence that they were so moist as to enormously or substantially affect the net weight of the contents as found by the chemist. I am of the view that the evidence of the chemist has been correctly accepted by the trial judge who has neither erred nor misdirected himself.

In this respect, I hold that the accused's ground of appeal challenging the finding by the chemist on the weight is without merit and therefore cannot be sustained.

BREAK IN THE CHAIN OF EVIDENCE

The exhibit which was handed over to SP2, En Ignoto bin Sibon, the exhibit store keeper, by SP10, Inspector Suzaini on 20 October 1999 for safekeeping and it was entered as exhibit No 74/99 in the exhibit register. SP2 held the key to the safe until it was handed over to SP10, Inspector Suzaini on the date of hearing. He identified the exhibit before the trial judge. I am unable to find any evidence to support the defence contention pertaining to the break in the chain of evidence.

THE MOTORCYCLE

Shaharuddin bin Udin ('SP5') who worked in the same place as the accused for some three years is the owner of a Suzuki motorcycle bearing registration number WGG 6438 ('the motorcycle') which he and his friends used as a means of transportation. On 24 September 1999, the accused borrowed the motorcycle from SP5 in order to return to his kampong in Melaka for two days. No jacket or parcel was seen on the motorcycle when it was delivered by SP5 to the accused. This finding of fact by the trial judge is sufficiently supported by evidence adduced for the prosecution and for the defence.

ROAD BLOCK AT TOLL PLAZA

On 24 September 1999, SP8, Chief Inspector Mohamad Hanifa, who was in charge of operations and investigations in the Narcotics Department of the Melaka Police Contingent, was together with his team on duty at the Ayer

Keroh toll plaza at about 7.40pm manning a road block when he saw the motorcycle from the direction of Kuala Lumpur to Melaka. That place was bright as there were street lights and spot lights. Detective Sergeant Mat Khalid (who was not called as a prosecution witness but made available to the defence) in SP8's team stopped the motorcycle for inspection. It was ridden by the accused as the sole motorcyclist. SP8 approached the accused and requested for the accused's identity card which the accused handed to SP8.

SP8 directed the accused to alight from the motorcycle so as to conduct a body search in the presence of Detective Corporal Amar Harun, Lance Corporal Mohd Sham bin Ahmad ('SP9'), Detective Sergeant Mat Khalid and Detective Corporal Nathan who were some of the members of his team. SP8 recovered a black plastic parcel from the lower left pocket of the green jacket worn by the accused.

Upon opening the parcel, SP8 found a granular substance suspected to be cannabis (ganja) which was wrapped in clear plastic parcel. On further examination, he found four plastic packets containing substances suspected to be cannabis (ganja), and also another black plastic parcel tied with rubber band which contained dried leaves suspected to be cannabis (ganja), all of which together with the jacket were seized by SP8, after informing the accused of the offence. SP8 then directed Detective Corporal Nathan to handcuff the accused.

SP8 placed the suspected cannabis in an empty red plastic bag in his car and put the jacket on the car cushion. He then locked his car and kept the key. SP8 later drove his car, while Lance Corporal Mohd Sham bin Ahmad ('SP9') took the motorcycle. Other members of the team accompanied the accused in a van. They proceeded to the police station in Durian Tunggal ('the police station'), where SP8 lodged a police report and weighed the contents in the red plastic bag. The gross weight was 198g. Thereafter, SP8 put the contents into the red plastic bag and brought them, together with the jacket, to the Alor Gajah district police headquarters where he handed them to Lance Corporal Mohd Sham ('SP9') who was subsequently there. SP9 in turn handed them to the investigating officer Inspector Suzaini, SP10.

Under cross-examination, SP8 testified that apart from the jacket, the accused was wearing a shirt and a pair of long pants, and that SP8 dated and marked the jacket as 'X'.

In re-examination, SP8 said that the accused was wearing the jacket from which the exhibits were recovered, and the accused then removed the jacket to give it to SP8.

SP9, Lance Corporal Mohd Sham bin Ahmad who was in SP8's team corroborated SP8's evidence, in particular pertaining to the recovery of the exhibits from the lower left pocket of the jacket worn by the accused and this was further confirmed by SP9 under cross-examination.

PRIMA FACIE CASE

On the aforesaid evidence, the trial judge found that the prosecution has established a prima facie case against the accused who was ordered to enter on his defence, in which he elected to give evidence on oath.

At this juncture, I am of the view that the trial judge has correctly called on the accused to enter on his defence as there was a prima facie case under s 6 of the Act as stated in the charge as the accused has in his control the cannabis.

DEFENCE CASE

The accused in his defence testified that he became a member of the fire services from 2 February 1991 and before his arrest on 24 September 1999, he was serving in Taman Koperasi Polis Fire Services Department, Gombak. On 24 September 1999, he was on leave until 25 September 1999 in order to return to his kampong in Permatang Pasir Melaka.

Although the accused has his own motorcycle on 24 September 1999, it was without any valid road tax. He borrowed the motorcycle which had a valid road tax, from his colleague, one Shaharuddin bin Udin ('SP5').

At about 4pm, the accused used the motorcycle to return to Taman Sahabat Kuala Lumpur in order to borrow a jacket from one Zaharuddin bin Jamaluddin ('SD2'). On arrival there, the accused went to Zaharuddin's house on the upper floor of a double-storey semi-detached house, where the accused took the green jacket from amongst the clothes which he saw on the right portion of the house. He said he did not own a jacket and this was the first time he borrowed it to keep himself warm on his journey to his kampong. He identified the jacket produced by the prosecution.

The accused did not wear the jacket in SD2 Zaharuddin's house but did so upon leaving the house.

When the accused took the jacket, he did not examine it although he felt it was thick and heavy, which he was wearing throughout the entire journey from Kuala Lumpur to Melaka.

On arrival at the Ayer Keroh toll plaza, he was stopped and examined by the police team. He gave his identity card, removed his crash helmet and jacket, from the lower left pocket of which a black parcel was recovered. When questioned about the parcel, he pleaded ignorance as he said he had borrowed the jacket.

The accused was nervous as he did not have a driving licence.

The accused was subsequently sent to Durian Tunggal police station, from where they were sent and handed over to Inspector Suzaini ('SP10') at Alor Gajah police station and then detained in the lock-up.

On 26 September 1999, the accused was questioned in relation to the parcel and the next day, his statement was recorded.

Under cross-examination, the accused disagreed that he was still wearing the jacket while on his motorcycle when he was stopped at the road block. He also disagreed that Chief Inspector Mohd Hanifa ('SP8') examined the jacket from which cannabis was recovered.

He disagreed that it was after the parcels were recovered from the jacket that he removed the jacket which he had been wearing for three hours. He also disagreed that he could feel the parcels in the jacket. He denied that the jacket was his and that he knew of the parcels therein.

A In re-examination, he testified that on the day of his arrest, he did not know the content in the jacket which he borrowed from his friend.

SD2, En Zaharuddin bin Jamaluddin, a fireman based at the Fire Brigade, Taman Koperasi Polis, Kuala Lumpur, testified that he and six other bachelors rented the upper floor of a two-storey house in September 1999 and that the accused was his colleague.

B On 24 September 1999 at about 5pm, the accused came to SD2's house to borrow the jacket which the accused personally took from the hall.

SD2 said the jacket belonged to one Mohd Rasul bin Ghazali, also a fireman who used to be a tenant there, but has shifted to Kuantan around December 1999 and early 2000.

C The house in question was always locked when no one was in and the key was kept on top of the window, known to all occupants. The accused borrowed the jacket by informing SD2 although the jacket belonged to Mohd Rasul who was no longer staying there on 24 September 1999.

That was the case for the defence.

D

DUSTING FOR FINGERPRINTS

As regards the defence submission on SP10's failure to dust for the accused's fingerprints, it is to be observed that on the facts of this case as established in the evidence, there is absolutely no doubt as to the identity of the accused

E who was wearing the jacket from which the cannabis had been recovered.

I am of the view that the trial judge has correctly followed the well-considered judgment delivered by Chong Siew Fai CJ (Sabah & Sarawak) for the Federal Court in *Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 at p 575, in the following words:

F

> ... Where the identity of the culprit is in question or required to be proved, fingerprint evidence would be of great significance and immense value. In the present case under appeal, ... there was evidence indicating the identities of the alleged offenders and the sale transaction. Fingerprint evidence ..., therefore, assumed little value or significance.

Accused's learned counsel sought support in *Public Prosecutor v Fom It*

G *Cheong* [1991] 1 CLJ 160 where Richard Talalla JC (later J) held, inter alia, that a doubt was raised as to why no fingerprint dusting was carried out on the jacket or the parcels containing the drug exhibits and gave the benefit of the doubt to the accused. In that case, the drugs were not found in the accused's hands or on his person but in two separate rooms, which facts are clearly distinguishable from those apparent in the instant appeal. Had the

H drugs in *Fom It Cheong*, supra, been found on the accused's person, as has been established in the instant appeal, there would have been no doubt whatsoever that fingerprint dusting would have been unnecessary.

BORROWED JACKET

I The accused in his defence testified that the jacket was borrowed from Mohd Rasul. It must be stated that this issue of the borrowed jacket was never put to any of the prosecution witnesses. Learned counsel did not raise

this issue in his submission at the close of the case for the prosecution before the trial judge.

Had the jacket been borrowed by the accused, this issue would certainly be put to any of the prosecution witnesses so that a foundation could be laid for the defence to make a submission thereon. This did not appear to have been done by the defence.

On this score, learned deputy submitted that the issue of a borrowed jacket is a recent invention and should be rejected.

Learned defence counsel in reply thereto submitted that the jacket has been borrowed by the accused from DW2.

In my judgment, there is merit in the learned deputy's submission that the issue of the borrowed jacket is a recent invention or an afterthought. The case for the defence may be considered a recent invention or an afterthought if a defence is sprung in court for the first time when the accused makes his defence from the witness box as in the instant appeal so that the prosecution is taken by surprise: *Public Prosecutor v Mohamed Noor bin Jantan* [1979] 2 MLJ 289; *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 and *Pendakwa Raya v Tan Chee Kern & Anor* [2001] MLJU 557, [2002] 1 CLJ 210.

Further, the submission that the jacket was borrowed from DW2 is incorrect as there was no evidence to that effect. However, the defence evidence of a borrowed jacket from Mohd Rasul has been correctly rejected by the trial judge.

'MENGUASAI' (CONTROL)

As the charge against the accused is that the accused was found in control of ('didapati menguasai') the cannabis in question, the trial judge is of the view that there was sufficient evidence to establish that the accused was the person who has control of the cannabis. The trial judge accepted the evidence of SP8 and other witnesses in connection with the arrest of the accused from whose jacket the cannabis was recovered. He also found that it was impossible for the accused not to know the presence of the drugs, having regard to the fact that the accused has travelled from Kuala Lumpur to Melaka, and that the accused had been wearing the jacket for some three hours.

Further the accused being the motorcyclist has to mount the motorcycle thereby necessitating the movement of his body which must have been hugged by the jacket in the course of the journey, creating the feeling of presence and contact with the not inconsiderable quantities constituting the contents recovered from the lower left pocket of the jacket.

The word 'control' has not been statutorily defined in the Act and so guidance may be derived from its ordinary popular dictionary meaning as follows:

(1) the power of directing, command, restraint (*The Concise Oxford Dictionary* (9th Edn, 1995)); and

(2) exercising restraint or directing influence (*Black's Law Dictionary*)

Illustrations of the meaning of 'control' are also to be found in judicial pronouncements of our courts.

In *Ho Seng Seng v Rex* [1951] MLJ 225, the appellant was found carrying a basket containing one large paper parcel and one small. The large parcel, which was on top, contained 12 pieces of opium. The appellant was convicted by the district judge under s 6 of the then Dangerous Drugs Ordinance. When he was arrested, the appellant said that the basket had been handed over to him by another person named Ah Tan, who had asked him to go to a coffee shop and wait for him there, and that he knew nothing of the contents of the basket.

On appeal, Brown Ag CJ sitting as a High Court Judge held that the district judge had misdirected himself upon the burden of proof and allowed the appeal, holding that the element of knowledge is implicit in the word 'control' and that one cannot have control of a thing unless one knows it is there ie the onus was upon the prosecution to prove to the satisfaction of the court that the appellant knew that a dangerous drug was in the basket, which in turn would raise the presumption under s 37(d) that the appellant was in possession of it and knew that it was opium.

The learned Acting Chief Justice explained that the term 'control' has a more restricted meaning than 'possession' and referred to the characteristics of 'possession' laid down by the Court of Criminal Appeal in *Toh Ah Loh and Mak Thim v Rex* [1949] MLJ 54 as follows:

(a) the possessor must know the nature of the thing possessed;

(b) he must have a power of disposal over it; and

(c) he must be conscious of his possession of the thing.

The learned Acting Chief Justice opined that for the term 'control', it is sufficient for the prosecution to prove characteristics (b) and (c), in which case the prosecution is deemed to have proved characteristic (a) for the purposes of 'possession'.

Ambrose J in *Neo Koon Cheo v Reg* [1959] MLJ 47 disagreed with the view expressed by the learned Acting Chief Justice in *Ho Seng Seng*, supra, and explained that the word 'control' must be construed to mean any form of control other than actual physical control, and that actual physical condition would be 'custody' for which other names are 'physical possession', 'de facto possession' and 'detention'.

In *Neo Koon Cheo*, a party of three detectives made a raid on the attic of a premises, and on entering the attic, two of the detectives saw the appellant holding a confectionary tin in his hands and attempting to get out of the attic through an opening. On examination the tin was found to contain a phial of chandu, a small tin of chandu dross, an opium pipe-head, a rag and some tools. The appellant was charged with and convicted of possession of prepared opium and smoking utensils in contravention of ss 9 and 10(2) respectively of the Dangerous Drugs Ordinance. In dismissing the appeal, Ambrose J held that the contents of the confectionary tin were in the appellant's control.

Neo Koon Cheo, supra, was followed by Jeffrey Tan JC (now J) in *Public Prosecutor v Sim Ah Ba & Anor* [1997] 4 MLJ 47 pertaining to the construction of the word 'control' as any form of control other than physical control. A

Having considered the meaning of the word 'control' as explained in the aforesaid authorities, I am of the view that the meaning attributed to this word by Ambrose J in *Neo Koon Cheo* and followed by Jeffrey Tan JC (now J) in *Sim Ah Ba* represents the better view, with which I agree and adopt in this appeal for the purpose of construing the word 'control' (or 'menguasai') in the charge preferred against the accused ie any form of control. B

In the circumstances, I hold that the trial judge is correct in finding that the accused who was wearing the jacket from which the cannabis has been recovered, has in his control the cannabis, in which case s 37(d) of the Act has been correctly invoked by the trial judge to raise the presumption that the accused is deemed to have been in possession of the cannabis and shall, until the contrary is proved, be deemed to have known the nature of such drug. C

D

BARE DENIAL BY ACCUSED

It was the finding of the trial judge that in the defence evidence, the accused's denial of knowledge of the cannabis was a bare denial. The accused's evidence that he did not examine the jacket and that he did not know the contents in the jacket was not accepted by the trial judge. As a matter of fact, the trial judge did not believe the defence story and was of the view that it was fanciful for the accused to take the jacket without knowing the contents thereof. E

The trial judge stressed that the accused had no driving licence when he was riding the motorcycle and had used his position as a fireman to conceal his wrongdoing. F

I am of the view that there is sufficient evidence for the trial judge to arrive at his finding of facts and that the accused has not rebutted the presumption on a balance of probabilities.

The trial judge has also considered the credibility of the witnesses for both the prosecution and the defence in great detail and has given his reasons therefore, including his own observation of their demeanour respectively. G

In this respect, it is useful to follow the established principles which have been succinctly stated by Haidar FCJ in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193 at p 215 FC to the effect that an appellate court should be slow to disturb the finding of facts of the lower court. His Lordship added that unless it can be shown that the findings of facts are not supported by the evidence or it is against the weight of evidence or that it is a perverse finding it is not for the appellate court to disagree. H

It was also held by the Federal Court that the appellate court should be slow to disturb the trial judge's assessment and finding on the demeanour of the witnesses. I

A CONVICTION

Having carefully perused the appeal record, I am satisfied that the trial judge has not occasioned any miscarriage of justice in his conclusion and finding that the prosecution has proved its case against the accused beyond reasonable doubt and that the accused was guilty of the offence as charged, B thereby convicting the accused. I therefore uphold the conviction.

SENTENCE

In imposing the sentence of 11 years' imprisonment and 10 strokes of the rotan, the trial judge took into account public interest as the accused is a C fireman and rescue worker who should not misuse his position to commit an offence which is an abhorrence to society.

The conviction against the accused is in respect of an offence of having in his control 176.7g of cannabis under s 6 of the Act and since the weight of cannabis recovered from the accused is more than 50g in weight, under D s 39A(2)(f) of the Act, the punishment thereof is provided under s 39A(2) of the Act ie the accused is liable to be punished with imprisonment for life or for a term which shall not be less than five years, and he shall also be punished with whipping of not less than ten strokes.

The aforesaid sentence meted out by the trial judge is therefore, clearly E within the ambit of s 39A(2) of the Act and is fair and reasonable having regard to the facts and circumstances of this appeal.

It is trite law that an appellate court should be slow and must indeed refrain from interfering with a sentence passed by a trial court unless it is wrong in law or is manifestly excessive or inadequate in the circumstances F of the case: *R v Ball* [1951] 35 Cr App R 164; *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256; *Public Prosecutor v Fam Kim Hock* [1957] MLJ 20; *New Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27.

The power of sentencing is essentially an exercise of discretion which is capable of correction by the appellate court only if it is exercised not according to established judicial principles or is against public interest or G other sentencing policy established by judicial pronouncements or the legislature.

After carefully perusing the appeal record, I hold that the trial judge has imposed the sentence in exercise of his discretion judicially, correctly, fairly and reasonably and I affirm the sentence meted out by him.

H In the circumstances, this appeal against conviction and sentence is hereby dismissed.

Appeal dismissed.

I Reported by Lim Lee Na